No. 82-1545

In the Supreme Court of the United States

October Term, 1982

RICHARD C. KAISER,
Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS IN OPPOSITION

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QUESTION PRESENTED

A dispute arose between a railroad employee and his employing railroad over the interpretation and application of the collective bargaining agreement. The dispute was progressed by the employee, through his counsel, to the National Railroad Adjustment Board (NRAB). The Board, by a decision of a neutral referee, denied the employee's claim on its merits. The question presented is: whether the Court of Appeals correctly held that the decision of the NRAB is conclusive on the employee, the union to which he belonged and the employing carrier and that the only review of that decision is set forth in Section 3, First (q) of the Railway Labor Act.

PARTIES INVOLVED

Respondent Brotherhood of Locomotive Engineers (BLE) is the collective bargaining representative for the craft of locomotive engineers employed by respondent Consolidated Rail Corporation (Conrail). Petitioner was employed by Conrail as a locomotive fireman and was a member of BLE.

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STATEMENT

Petitioner was hired by the New York Central Railroad in 1967. He worked as a fireman for six and one-half years for the New York Central and its successor, Penn Central Transportation Company. During the year 1973, he attempted to pass the qualifying examination to become a locomotive engineer. This attempt to qualify was pursuant to a contractual rule in effect between the railroad and

the Brotherhood of Locomotive Firemen & Enginemen (BLF&E), now the United Transportation Union (UTU). Said rule (CA App. 66)[1] provided, inter alia, that should an individual fail to pass the qualifying examination three times, he would be discharged from service. Petitioner failed to report for the first examination held on September 4, 1973, and said failure was reported to petitioner by certified letter dated September 26 (CA App. 47). He failed to take the second examination on October 31, 1973 and acknowledged said failure the same date by signing a receipt of the notice. This notice also advised petitioner that the third and final examination would be held on December 5, 1973 (CA App. 48). Petitioner took the examination on December 5, 1973 and failed said examination. Again, he acknowledged said failure on the same date by signing a receipt of the notice (CA App. 52). On December 5, 1973, petitioner was removed from service by letter from the railroad, receipt of which was acknowledged by him on the same date (CA App. 53).

At all times relevant hereto, petitioner was employed in the craft of locomotive firemen and his rules, wages and working conditions were governed by the collective bargaining agreements in effect between the railroad and the BLF&E or the UTU (CA App. 35). At no time during petitioner's railroad employment did the BLE represent employees working as locomotive firemen on said railroads, and its agreements do not cover employees in that craft (CA App. 34-35). In addition, BLE had nothing to do with

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1. References "CA App." are to the appendix before the Court of Appeals for the Sixth Circuit. By letter dated December 27, 1982, counsel for petitioner stated that he would forward to the Supreme Court with the Petition for Certiorari copies of the joint appendix used in the Court of Appeals. He failed to file a joint appendix; therefore, respondent BLE shall refer to the appendix before the lower court.

the hiring, employment, initial assignments, administration of examinations or qualification or disqualification of locomotive firemen on railroads employing petitioner (CA App. 35). The BLE is the duly designated collective bargaining representative for the craft or class of locomotive engineer employees, and for that craft only, on respondent Conrail and its predecessor railroads.

Following his dismissal from railroad service, BLE had no further contact with petitioner for a period of two or three years. It was during this period, unbeknown to BLE, that petitioner commenced an action against Penn Central for breach of contract in the United States District Court, Northern District of Ohio, Western Division, Case No. C75-480 (CA App. 16-18). Said Complaint was dismissed on August 5, 1976 (Pet. App. 23-26).[2]

BLE had no knowledge of any request by petitioner to process any claim or grievance in his behalf within the contractual time limits, and petitioner never communicated with any officer of the BLE. Other than the fact that petitioner was a BLE member[3] until February, 1974, BLE had never heard of petitioner or his claim or grievance against Conrail until served with a copy of his complaint in this case filed on December 5, 1979 (CA App. 34).

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2. References "Pet. App." are to the Appendix attached to the Petition.

3. On page 5 of the Petition, petitioner states that a "closed shop" required him to join the BLE. This is an erroneous statement as Section 2, Eleventh (c) of the Railway Labor Act, 45 U.S.C. §2, Eleventh (c) provides that an operating employee satisfies the union shop requirement if he belongs to any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services. Petitioner could have joined the BLF&E and subsequently the UTU as craft representative.

In September 1976, petitioner and/or his attorney made their first attempts to process a claim or grievance to the NRAB. On May 29, 1977, petitioner filed his submission or claim with the NRAB, First Division. Penn Central, now Conrail, filed its answer to the submission on September 16, 1977. On November 30, 1977, the dispute was docketed by the NRAB as R 43 043. An oral hearing was held on January 25, 1978, at which both petitioner and his attorney appeared before said Board (CA App. 37). Section 3, First (j) of the Railway Labor Act, 45 U.S.C. §153, First (j), provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

While the NRAB case was awaiting decision, petitioner, on December 5, 1979, filed a second lawsuit in the United States District Court, Northern District of Ohio, Western Division, Case No. C79-712, naming Conrail and BLE as defendants (CA App. 2). The complaint made conclusory allegations that BLE had breached its duty of fair representation. BLE filed a motion to dismiss or, in the alternative, for summary judgment with supporting affidavits (CA App. 32-35, 36-67). Petitioner failed to file affidavits or other materials in opposition to the issues raised by the BLE (Pet. App. 33), and the District Court granted the motion for summary judgment (Pet. App. 34).

Petitioner filed a notice of appeal on May 12, 1981 (CA App. 26). On September 3, 1981, during the pendency of his appeal before the Court of Appeals for the Sixth

Circuit, the NRAB rendered its decision on petitioner's claim (Pet. App. 35). In denying said claim, the Neutral Referee,[4] Robert E. Peterson, stated:

> "The Claimant admittedly failed to pass the promotional examination after being afforded the opportunity to attend numerous instructional classes. Moreover, reasons advanced by Claimant for his failure to take the promotional examination when scheduled, or to have availed himself of instructional classes, is suspect and self-serving. Accordingly, Claimant having failed to comply with the requirements mandated in the controlling agreement relative to promotional examinations, the claim is without merit and will be denied."

The Court of Appeals summarily affirmed the judgment of the District Court (Pet. App. 22). Attached hereto as an appendix to this response is a transcript of the proceedings before that Court.[5] Petitioner's petition for rehearing en banc was denied on December 16, 1982 (Pet. App. 37).

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4. Section 3, First (l) of the Railway Labor Act, 45 U.S.C. §153, First (l) provides that a neutral person will be appointed when members of labor organizations and the carriers cannot make a decision and deadlock. Here, members of labor voted to sustain the claim and members of the carriers voted to deny the claim. As a result, Mr. Peterson was chosen as the neutral to decide the case.

5. The transcript was prepared from a tape of the proceedings taken by the Clerk of the Court of Appeals. Because of background noise, etc., the tape is not perfectly clear, yet it was transcribed by an individual who swore to its accuracy to the best of her ability. Said appendix is designated at p. A1.

REASONS FOR DENYING THE WRIT

This case involves no question of law that is novel or worthy of review. The decision on the merits of the NRAB of a dispute between an employee and his carrier over the interpretation of a collective bargaining agreement is conclusive on the parties, and petitioner's only avenue for review is pursuant to Section 3, First (q) of the Railway Labor Act, 45 U.S.C. §153, First (q). The petitioner cannot show a meritorious claim in view of the decision by the NRAB; therefore, BLE could not have breached its duty of fair representation. Furthermore, the established facts in this case clearly show that the conduct of BLE was not hostile, discriminatory, or in bad faith.

Contrary to petitioner's assertions, the decision below is not a departure from the decisions of this Court in *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969) and *Vaca v. Sipes*, 386 U.S. 171 (1967) but consistent therewith. There is no conflict between the Circuits, and the decision below presents no question under the Railway Labor Act which merits this Court's review. The decision is consistent with the holdings of this Court and its reading of the Railway Labor Act.

I.

THE DECISION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD IS CONCLUSIVE ON THE PARTIES

On September 3, 1981, the NRAB, First Division, denied petitioner's claim on its merits (Pet. App. 35). It is well established that awards of the NRAB are to be final and binding. *Union Pacific R.R. v. Price*, 360 U.S. 601

(1959). Section 3, First (q) of the Railway Labor Act, 45 U.S.C. §153, First (q) provides for and defines the narrow extent of the only review available for NRAB awards (Pet. App. 39).

This Court in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), in terms dispositive of this case, said:

> "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. Union Pacific R. Co. v. Price, 360 U.S. 601, 3 L Ed 2d 1460, 79 S Ct. 1351 (1959). He is limited to the judicial review of the Board's proceedings that the Act itself provides. Gunther v. San Diego & A. E. R. Co., 382 U.S. 257, 15 L Ed 2d 308, 86 S Ct. 368 (1965)." *Id.* at 325.

This Court in *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1979) once again emphasized the importance of keeping "minor disputes" out of the courts, stressed that any review of a board award must be pursuant to Section 3, First (q) and that the allegedly aggrieved party must meet the statutory grounds prescribed by the statute, the *Sheehan* Court said:

> ". . . the dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. Section 153 First (q) unequivocally states that the 'findings and order of the (Adjustment Board) shall be conclusive on the parties' and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. See, e.g., Gunther v. San Diego & A. E. R. Co., 382 U.S. 257, 263, (1965); Locomotive En-

gineers v. Louisville & Nashville R. Co., 373 U.S., *supra*, at 38; Union Pacific R. Co. v. Price, 360 U.S. 601, 616, (1959)." *Id.* at 93-94.

This Court went on to say that a contrary conclusion would ignore the terms, purposes and legislative history of the Railway Labor Act.

In view of the plain reading of Section 3, First (q), petitioner herein must file a petition to review the NRAB decision in the appropriate United States District Court alleging the factual basis for the limited review discussed in the *Sheehan* case. To permit otherwise, would be in contravention of the minor disputes procedures of the Railway Labor Act, the finality of NRAB decisions and the legislative history and case law developed by this Court.

II.

THE ESTABLISHED FACTS IN THIS CASE SHOW THAT BLE DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION

As stated by the District Court and affirmed by the Court of Appeals, petitioner failed to file affidavits or other materials in opposition to the issues raised by the BLE; therefore, petitioner did not meet the burden imposed by Rule 56(b) of the Federal Rules of Civil Procedure. Although this is not an issue that needs to be addressed by this Court, a short discussion of the duty of fair representation clarifies BLE's position in this case.

It is well recognized that the purpose of summary judgment is to determine whether there is any genuine issue of material fact in dispute, and if not, to render judgment in accordance with the law as applied to the established facts. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144

(1970). The courts below concluded that BLE did not violate the fair representation duty as that duty has been defined and applied by this Court.

This Court has said that to establish a breach of the duty of fair representation, petitioner is required to show a meritorious contractual claim. In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court said that a union "may not arbitrarily ignore a *meritorious* grievance or process it in a perfunctory fashion." (Emphasis added). *Id.* at 192. This Court stated the complainant does not establish a breach of the duty of fair representation by merely showing that he was wrongfully discharged. The Court stressed, "he must *also* have proved arbitrary or bad faith conduct on the part of the union in processing his grievance." (Emphasis added). *Ibid.* More recently, in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976); this Court again held:

> "To prevail against *either* the company or the union, petitioners (the employees) must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty of fair representation by the union." (Emphasis supplied).

The decision of the NRAB on the merits conclusively determines that petitioner's discharge was in accordance with the collective bargaining agreement; therefore, petitioner cannot meet the first test to establish a breach of the duty of fair representation, a meritorious claim. Summary judgment was properly granted.

Similarly, petitioner cannot establish arbitrary or bad faith conduct on the part of BLE. This Court in *Vaca v. Sipes, supra,* defined what constitutes a breach of the duty of fair representation:

> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190.

This Court has also said that to establish a breach of the duty of fair representation, complainant must show substantial evidence of fraud, deceitful action or dishonest conduct on the part of the union. *Humphrey v. Moore,* 375 U.S. 335 (1964); *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971). The uncontroverted facts in the instant case establish that the conduct of the BLE does not fit within the categories of conduct discussed by this Court. Therefore, petitioner is also unable to meet the second test necessary to establish a breach of the duty of fair representation.

III.

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW, THE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER CIRCUITS

Petitioner contends that the decision below conflicts with the decisions of this Court in *Glover v. St. Louis-San Francisco R. Co.,* 393 U.S. 324 (1969) and *Vaca v. Sipes,* 386 U.S. 171 (1967). BLE has already discussed the applicability of *Vaca* to the instant case. *Glover* is easily distinguished from the case at bar. In *Glover,* suit was brought by a group of union employees, both black and white, against their employer and union alleging racial discrimination and their futility in attempting to convince their union to pursue contractual and administrative remedies. Plaintiffs sought damages and injunctive relief. The Court said that plaintiffs need not exhaust their administrative remedies stating:

> "Moreover, although the employer is made a party to insure complete and meaningful relief, it still remains true that in essence the 'dispute' is one between some employees on the one hand and the union and management together on the other, not one 'between an employee or group of employees and a carrier or carriers.' Finally, the Railroad Adjustment Board has no power to order the kind of relief necessary even with respect to the railroad alone, in order to end entirely abuses of the sort alleged here." 393 U.S. at 329.

In the case at bar, the petitioner was permitted, and in fact, completed the arbitration process. The dispute was one between an individual on one hand and management on the other. This is obvious from the fact the members of the First Division of the NRAB deadlocked and a neutral referee had to be chosen to decide the dispute. Finally the NRAB had the power to provide petitioner with complete relief, reinstatement and back pay. The instant case has none of the factual distinctions present in *Glover* and is governed by the rationale in *Andrews, supra*, and *Sheehan, supra.*

Petitioner also contends there is a conflict between the decision below and decisions of other circuits. The case of *Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (2nd Cir. 1974) involved a situation where the complainant was not permitted to take his case to arbitration because the union defaulted on the time limits. In the instant case, petitioner, through counsel, took his case to arbitration in accordance with Section 3, First (j) of the Railway Labor Act, 45 U.S.C. §153, First (j) and lost the case on its merits. *Otero v. Int'l Union of Electrical Workers*, 474 F.2d 3 (9th Cir. 1973) was not a case under the Railway Labor Act and merely holds that the arbitration procedure contained

in the collective bargaining agreement must be followed. A similar conclusion was reached in the case of *Dorsey v. Chesapeake & Ohio Ry.*, 476 F.2d 243 (4th Cir. 1974).

The lower court recognized the exception in *Glover* (Pet. App. 29) and properly found that the factual bases for the exception in that case did not apply to the instant case. There is no conflict between this case and *Glover*, and the decisions of the various circuit courts cited by petitioner, rather than being in conflict, support the decisions of the lower courts.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

The following is a transcript of the October 6, 1982 oral argument before the United States Court of Appeals for the Sixth Circuit in *Kaiser v. Consolidated Rail Corp. et al.*, No. 81-3290 (6th Cir. Oct. 21, 1982). This transcript was prepared from the cassette tape recording furnished by the Clerk of the United States Court of Appeals for the Sixth Circuit.

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[Not understandable prior to this point]

Counsel: Good morning Your Honor. I would like to receive four minutes . . . .

Judge: Four, we better hold you on this one. The time . . . is not quite as complex.

Counsel: I am here today on behalf of Plaintiff-Appellant asking this Court to remand this case to the District Court for a hearing to be heard and decided by a jury is requested of an impartial and disinterested people. Plaintiff, Richard Kaiser, a fireman for 6½ years with the Penn Central Railroad Company was injured during his employment. Wanting compensation for his injuries and the carrier not granting it, he took that case to District Court. He was successful. He was told by some of the employees of the carrier that he was going to be terminated for his carrying that case out.

Judge: Counsel, let me ask you about . . . since we don't have too long here, we are going to have to get along, about your exhaustion problems. As I understand the facts there, they are that while the case was pending before the administrative agency your client filed suit in the Federal District Court. It was dismissed for ex-

haustion of remedies and there was never any appeal or review taken from the action of the administrative agency. This is a case that comes directly from the District Court. Now why, when they set up a procedure to go to an administrative agency to get this matter adjusted down at the Railroad Adjustment Board, and they set up an appellate procedure from the action of the administrative agency to the Federal District Court, why is not that the exclusive method for adjudicating this question and why are you permitted; why should we permit you to go directly to the District Court on the issue without following the procedure for administrative reviews set up in the statute?

Counsel: Your Honor, in answer to your question clearly the Railway Labor Act took the jurisdiction for minor disputes involving complaints or disagreements between a contract between an employee and an employer.

Judge: Well that's what you've got here. Termination, right?

Counsel: However, the long list of cases like *Glover* and *Vaca*, and so on had said that the National Railway Adjustment Board is comprised of members of both the carrier and the union. They are not disinterested parties. It's not fair and impartial determination . . . . As in this case, Plaintiff maintains that he was wronged by both of these people. That it's not fair under fundamental principles of justice to allow the same people he's claimed didn't treat him fair in the first place to then be allowed to decide the case in the second place.

Judge: Were you claiming something that the Board did was unfair?

Counsel: No. I am assuming that's why it came up at the *Glover* and that cases that allow jurisdiction in the

District Court where you have, as in this case, a breach of duty of contract and a breach of duty of fair representation. Assuming and as it says within those cases and a lot of cases that it is not fair to involve the same people who are claiming for unfair views to now decide the case.

Judge: Well, the statute allows it and that's final isn't it, except for three small, three limited—the petition is very very limited.

Counsel: Counsel agrees with Judge that the exceptions are three very small things.

Judge: That's right. The jurisdiction and the fraud and one other element. So really you simply can't mess with what Congress has allowed you to complain about in-so-far as the decision of the Board is concerned. But now you claim that under *Vaca v. Sipes* as I understand the complaint, that your ability to represent yourself and for the plaintiff to represent himself before the Board, his right to be represented by the union before the Board? Is it under *Sipes* that would be his right would have been lost and it would be actionable for unfair representation if they didn't present his claim fairly?

Counsel: In this case they never processed his grievance at all.

Judge: Who?

Counsel: The Union.

Judge: So you're not claiming that the Board itself wouldn't be able to entertain it until they got a grievance, so you can't complain about the Board.

Counsel: No, I am not complaining about the Board.

Judge: But you are complaining that the union should have processed his grievance or they had the obligation

of fair, good representation to present it unless they believed it was not meritorious.

Counsel: Right, and in this case they didn't process it at all. Under the belief that it wasn't meritorious, they just did not process it at all and it was never processed later under a leniency basis only. His union did process his grievance well after the time ran out and they determined that it was not a meritorious grievance.

Judge: I guess my problem that I saw was, this goes back to *Vaca v. Sipes,* it opens up . . ., when you can open up a grievance procedure because the employee did not have a good representation, then they say that equity says that it makes the employer the necessary party to that for relief even though the failure is all the part of the unions. But here they seem to have provided for an exclusive remedy with very limited appeal, and I am just wondering if *Vaca v. Sipes* really does apply here.

Another way of asking that same question which also bothers me is that *Vaca v. Sipes* is just an unfair representation situation. You know, like Judge . . . is saying where you allege the employer has done something wrong and that the union didn't fairly represent you. But *Glover,* the exception in *Glover* is not a *Vaca v. Sipes* exception. That was a case where the union and employer were acting in concert, together, to do something. It wasn't an unfair representation where the employer does something wrong and the Union just doesn't file a grievance or doesn't fairly represent somebody. So, I don't see that that exception applies. Why should that—if we applied the *Glover* exception to the *Vaca v. Sipes* situation, it would eat up the whole rule. That's the point, do you follow me?

Counsel: Yes, we do your honor.

Judge: Well, the trial judge found that this was a—what do they call it—a minor grievance, Counsel says "minor dispute", minor dispute so that puts it in the hands of the processing of what you've got. Finally, as I understand it when the claim went, they had it before a referee and the referee stated that facts lead to that you failed to comply with the facts mandated in the controlling agreement relevant to promotional examination of the plaintiffs without merit is denied. Was there any appeal from that?

Counsel: Are you talking about the first case of the District Court your honor?

Judge: Yes.

Counsel: No, your honor. There was not an appeal to that for two reasons. First, the judge—Judge . . . was correct in saying that incidentally minor disputes that is within the exclusive jurisdiction of the National Railway Adjustment Board. . . ., we went on to file the second cause of action which cured that subject matter jurisdictional defect in that we alleged breach of duty of fair representation in that the union and the carrier were acting together to deprive him of his right to a fair and impartial hearing. The Court, and I am looking at it right here, made what I would say an incorrect statement "determination that this dispute involved herein is minor, leaves this Court without jurisdiction." I am saying that those cases *Vaca* and *Glover* say that's not true. It can be a minor dispute, but the District Court does not have jurisdiction when you allege that it is a problem against both the carrier and the union, not a dispute between the employee and the carrier; or a dispute between an employee and the union. When you allege both, that's what all those cases cite. I am citing *Vaca* and *Glover* and more talking towards the cases and the line of thinking of the judges in those cases than the act of holding of

that case. It is within those cases where they expound upon the fundamental principles that Congress in taking away . . . jurisdiction in these matters and giving it to arbitration, and giving it to the National Railway Adjustment Board, didn't have in mind that when you are alleging that both of those people, who are acting in bad faith that you now have to go against those people. You could go to the District Court to get a fair and impartial determination of your claim. I think that's the real holding of the fundamental principles of justice that they expounded in any of the cases that have allowed an employee to go to District Court and not go to the National Railway Adjustment Board. We went to the National Railway Adjustment Board first thinking that we had to exhaust our administrative remedies, and we went and filed again in District Court after reading enough cases and realizing we didn't have to do that. We never really wanted the case before the National Railway Adjustment Board and we were not surprised that the National Railway Adjustment Board after one being deadlocked to decide against it. That was not a surprise. I assume that the very people that we're complaining of unfair handling without impartiality also found against it, the line of reasoning which gives us the right to go to District Court. And that Court is speaking basically to our claim against the carrier. I think that in the second case the union was dismissed under summary judgment under Rule 56, and I think Judge Young in plaintiff did not present an affidavit or any other evidence to establish that there was a genuine issue of material facts in dispute, in that case, our pleading in our second case was considerably different than the pleading in the first case. In the second case the District Court is not the same as second case. The underlying principles of facts are the same party, the same time and the same fireman, but there is alleging a lot of those things in there, namely that the grievances

given to the union in care of the carrier is . . . different. We are alleging that there is an action between those parties in an overt attempt to deny him his process and that is why he was fired. We submitted an affidavit form which we allege contradictions to everything alleged in their motion for summary judgment in their affidavits. The judge said that we did not under Rule 56 give a summary judgment. In other words we got a partial determination of our case by a judge without being given the opportunity to present all the facts. I think Rule 56 and the cases under it say that they must be viewed, the affidavits must be viewed in the light most favorable to the party opposing the motion. He says in his opinion that we did not file any affidavits or raise any questions of material issues with immaterial facts. I think if you read our complaint, it notes that it is in affidavit form and read *Duke's* [?] decision, I don't really see how he came up with that conclusion. It is clear that we didn't raise as nearly many issues on which Reed and White [?] differ on.

Judge: 45 153(q) makes it a little difficult for us to take jurisdiction of it. Doesn't it? The Board's findings are being remanded and set aside only for failure of the Board to comply with the requirements of the Act, for failure in the Order to conform or confine itself for matters that only spoke of divisions jurisdiction or for fraud or corruption by a member of the division making the order.

Counsel: That's correct your honor. We are not asking for review of the National Railway Adjustment Board's decision. That's not what we are here for today. We are just asking to be allowed to present our case to District Court before a fair and impartial jury as we requested, and we only went to the National Railway Adjustment Board thinking that we would exhaust our ad-

ministrative remedies and after a little more careful study, we realized we didn't have to. And at the time of the first lawsuit the union was under leniency bases processing the grievance long after the time had expired for presenting it. They finally found that since it wasn't presented within the time period used to . . . the question which needs to be determined by an impartial people did he file a grievance within the sixty days? We say of course we did file the day, the very day he was terminated. They say we didn't file for some two years later. That's the genuine issue to be determined by a prior . . . . After full presentation of all the evidence, that is the evidence to support it. The issue of res judicata and collateral estoppel is the reason all the cases I've heard and I assume that's why this case got here today. The Appellee will argue that collateral estoppel or res judicata is determinative of subject matter's jurisdiction from the onset in this case. That we say—no it is not. There was never a hearing on the merits. Initially we agreed with the judge that this was a minor dispute because we didn't allege in our first case, and I had cited in my reply that the jurisdictional dismissals do not bar or prove litigation of a cause of action when a subsequent complaint cures the jurisdictional defect. I cite some cases on that. Appellee will have this Court believe that that determination as a minor dispute is the final judgment and thus res judicata for collateral estoppel bars second free . . ., we deny that.

Judge: Ok, you have used your time.

Counsel: Thank you.

Judge: Mr. Williams, we thank you for your argument and I notice it's your first appearance before us. Our Court has a rule, Rule 19, which allows the disposition be made from the bench when the Court is satisfied

after hearing an oral argument that it is unanimously agreed upon the result and satisfied that no jurisdictional purpose would be served by further written opinion. That doesn't mean that your appearances here and the other party's appearance was in vain because we do this, we have to decide a number a cases without oral argument. But there's a certain other group where we think we are quite certain about the result, but we want to hear the oral argument because once in a while something comes up to tell us we were wrong; so we were listening with particular care to Mr. William's argument. However, we are convinced unanimously of the opinion that there was no error which was committed in the lower court which would occasion our reversal though we may not necessarily agree with all the reasons that Judge Merritt has basically set forth, the view that this was a matter for which was grieved under the Railway Adjustment Board; it was a minor grievance under the Act; and, that is agreed and that provides exclusive remedy with only three exceptions which may be the subject, not of appeal to this Court but of a petition for review directly rather than through the District Court. The counsel has agreed that those grounds do not exist. Under those circumstances we do not believe that *Vaca v. Sipes* or the other cases cited by the Appellant were such as to indicate any Congressional intention that District Court could collaterally intervene with and block the, or reach a, contrary decision of that which was reached by the Railroad Adjustment Board. In the absence of the findings that are required, of course the Supreme Court has spoken on that subject in *United Pacific Railroad v. Sheehan,* 439 U.S. 89 (1978). Accordingly, the Court finding no error in the proceedings of the District Court which would warrant the reversal of the judgment enter, will order forthwith affirming the judgment of the District Court. We thank you, however, for appearing.

No. 81-3290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD C. KAISER,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION, f/k/a PENN CENTRAL TRANSPORTATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Defendant-Appellees.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

Affidavit of Barbara Dutton

I BARBARA DUTTON do hereby certify that the attached type written transcript is a true and accurate record of the cassette tape recording furnished by the Clerk of the United States Court of Appeals of the October 6, 1982 oral argument in *Kaiser v. Consolidated Rail Corp. et al.*, No. 81-3290 (6th Cir. Oct. 21, 1982).

/s/ BARBARA DUTTON
BARBARA DUTTON

Sworn to and subscribed before me this 28th day of March, 1983:

/s/ CATHERINE ALDINGER
Notary Public
[Seal]